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August 14, 2014

Submitted via FOIA online

Larry Gottesman
National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: **FOIA Request re: National Pollutant Discharge Elimination System—
Final Regulations to Establish Requirements for Cooling Water
Intake Structures at Existing Facilities and Amend Requirements at
Phase I Facilities [EPA-HQ-OW-2008-0667] and Endangered Species
Act consultation concerning those regulations**

Dear FOIA Officer Gottesman:

We are writing on behalf of Riverkeeper, Inc. and the Natural Resources Defense Council (collectively, Requesters) to request records in the possession of the U.S. Environmental Protection Agency (EPA) pursuant to the Freedom of Information Act (FOIA). This request pertains to the final rule entitled *National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities* (EPA-HQ-OW-2008-0667) (hereinafter, “Final 316(b) Rule”) that was signed by the Administrator and posted on EPA’s website on May 19, 2014, and is expected to be published in the Federal Register shortly. This request also seeks documents pertaining to the Endangered Species Act (ESA) consultation between EPA and the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, the “Services”) with respect to the Final 316(b) Rule (hereinafter, “ESA Consultation”).

I.

RECORDS REQUESTED

We hereby request:

(a) **Records of Communications with Non-Governmental Entities**. All records exchanged and all records related to any meetings, telephone conversations, emails, or any other communications between EPA and the utility (*i.e.*, electric generation) industry or manufacturing industry, representatives of the utility or

manufacturing industries, trade groups, special interest groups, and/or other non-governmental parties relating to the Final 316(b) Rule, the proposed version of that rule, the Notices of Data Availability for that rule, the ESA Consultation, and/or the Services' Biological Opinion or Incidental Take Statement (or any portion thereof) from April 19, 2011, to present.

(b) Records of Communications with Federal Government Entities. All records exchanged and all records related to any meetings, telephone conversations, emails, or any other communications between or among EPA staff¹ or between EPA and any other federal agency, department, office, official, employee, or federal entity or individual including but not limited to the U.S. Fish and Wildlife Service,² the National Marine Fisheries Service,³ the Department of Energy, the Small Business Administration,⁴ the Office of Management and Budget, the Office of Information and Regulatory Affairs,⁵ the Council on Environmental Quality,⁶ and any other entity or individual within the Executive Office of the President or the White House, including the White House Office, the Office of Administration, the Domestic Policy Counsel (including the Office of Energy and Climate Change),⁷ the Office of Science and Technology Policy,⁸ the

¹ Individuals at EPA whom we believe were or may have been involved in communications and whose files should be searched for responsive records include: Lisa Jackson, Gina McCarthy, Bob Perciasepe, Bob Sussman, Michael Goo, Arvin Ganesan, Ellen Gilinsky, Nancy Stoner, Ken Kopicis, Betsy Southerland, Ephraim King, Robert Wood, Mary Smith, Julie Hewitt, Paul Shriner, Tom Born, Paul Balserak, Lisa Biddle, Wendy Hoffman, Erik Helm, Samantha Wilson, Richard White, Alexis Wade, Marla Smith, Scott Fulton, Avi Garbow, Steve Neugeboren, Mary Ellen Levine and Richard Witt.

² Individuals at FWS whom we believe were or may have been involved in communications with EPA include: Gary Frazier, Rick Sayers, Drew Crane, and Patrice Ashfield.

³ Individuals at NMFS whom we believe were or may have been involved in communications with EPA include: Donna Wieting, Kristine Petersen, Cathryn Tortorici, Jennifer Schultz, Ron Dean, and Pamela Lawrence.

⁴ Individuals at SBA whom we believe were or may have been involved in communications with EPA include: Dr. Winslow Sargeant and Kevin Bromberg.

⁵ Individuals at OMB/OIRA whom we believe were or may have been involved in communications with EPA include: Cass Sunstein, Howard Shelanski, Dominic Mancini, Kevin Neyland, Jim Laity, Cortney Higgins, Jonathan Rackoff, Andrei Greenawalt, Amanda Thomas, Jeff Weiss, and Allie Neill.

⁶ Individuals at CEQ whom we believe were or may have been involved in communications with EPA include: Jeff Peterson, Gary Guzy, Drew McConville, Phillip Foy, Asha Sharma, Jia Li, Manisha Patel, Glenn Sheriff, Trey Lewis and Anne Finken.

⁷ Individuals at DPC or OECC whom we believe were or may have been involved in communications with EPA include: Dan Utech, Nat Keohane and Reid Magdanz.

⁸ Individuals at OSTP whom we believe were or may have been involved in communications with EPA include: Bruce Rodan.

Council of Economic Advisors,⁹ the National Economic Counsel,¹⁰ and the Office of the Vice President, relating to the Final 316(b) Rule, the proposed version of that rule, the Notices of Data Availability for that rule, or the ESA Consultation from April 19, 2011, to present.

(c) Draft Biological Opinions and Related Records. All draft, proposed, recommended or suggested Biological Opinions on the Final 316(b) Rule or portions or text of such Opinions, including but not limited to draft, proposed, recommended or suggested conclusions or determinations relating to jeopardy to federally-listed threatened or endangered species or adverse modification of critical habitat, or the Incidental Take Statement (ITS), as well as any communications (with anyone) or records of any kind relating to such Opinions, ITSs, portions or text.

(d) Other Rulemaking Records. All other records relating to the Final 316(b) Rule, the Notices of Data Availability for that rule, the proposed version of that Rule, or the ESA Consultation that are not already included in EPA's on-line docket for the Final 316(b) Rule, Docket ID No. EPA-HQ-OW-2008-0667, at www.regulations.gov.

(e) Records of Communications with the Office of the Federal Register. All other records of communications between EPA and the Office of the Federal Register (within The National Archives and Records Administration) concerning the publication of the Final 316(b) Rule.

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.¹¹

Requesters request electronic copies wherever possible. Please produce the records described above by emailing them to reed@superlawgroup.com or through FOIAonline, or by mailing them to the address listed on the first page of this letter.

Please produce the records on a rolling basis; at no point should EPA's search for,

⁹ Individuals at CEA whom we believe were or may have been involved in communications with EPA include: Ron Shadbegian.

¹⁰ Individuals at NEC whom we believe were or may have been involved in communications with EPA include: Nat Keohane.

¹¹ See 40 C.F.R. § 2.201(j).

or deliberations concerning, certain records delay the production of others that EPA has already retrieved and elected to produce. In the event that EPA determines that some of the records requested above may already be publicly available, we will be happy to discuss whether the scope of this request can be narrowed accordingly.

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request¹² and that such response must include a “determination” as to whether Requesters will receive all the documents they request – that is, “[EPA] must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.”¹³ Further, “FOIA requires that the agency make the records ‘promptly available,’ which depending on the circumstances typically would mean within days or a few weeks of a ‘determination,’ not months or years.”¹⁴

II.

CLAIMS OF EXEMPTION FROM DISCLOSURE

If you regard any documents as exempt from required disclosure under FOIA, please exercise your discretion to disclose them anyway. As you know, on his first full day in office, President Obama declared a “New Era of Open Government” and issued a memorandum to the heads of all agencies directing that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.”¹⁵ Agencies were directed to “adopt a presumption in favor of disclosure” and to apply that presumption “to all decisions involving FOIA.”¹⁶ Attorney General Holder’s FOIA Guidelines explain that the presumption of openness called for by the President means that information should not be withheld “simply because [an agency] may do so legally.” The Attorney General “strongly encourage[s] agencies to make discretionary disclosures of information.”¹⁷

Nevertheless, should you seek to withhold any records under FOIA’s narrow exemptions, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency’s justification for withholding it. This

¹² See 5 U.S.C. § 552(a)(6)(A)(i).

¹³ *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 186 (D.C. Cir. 2013).

¹⁴ *Id.* at 188 (citing 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i)).

¹⁵ President’s FOIA Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009. 74 Fed. Reg. at 4,683 (Jan. 26, 2009).

¹⁶ *Id.*

¹⁷ Attorney General’s FOIA Memorandum for the Heads of Executive Departments and Agencies, March 19, 2009. Available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*¹⁸ and related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

III.

FEE WAIVER

Requesters request that EPA waive all fees associated with responding to this request. FOIA dictates that requested records be provided without charge if “[1] disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and [2] is not primarily in the commercial interest of the requester.”¹⁹ As explained below, the requested disclosure would meet both of these requirements because Requesters’ request complies with each of the factors agencies and courts consider in making fee waiver determinations.²⁰ In addition, Requesters qualify as “representative[s] of the news media” entitled to a reduction of fees under the FOIA.²¹

In 2013, EPA twice granted fee waivers in conjunction with FOIA requests submitted by this office on behalf of the same Requesters seeking records relating to the 316(b) rulemaking based on a substantially identical demonstration of eligibility to a fee waiver under FOIA. The letters from EPA granting those fees waivers are attached hereto.

A. Disclosure is in the Public Interest.

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.”²² Specifically, as we discuss immediately below in subsections III.A.1-4, the requested disclosure would satisfy the four elements identified in EPA’s FOIA Regulations²³ and in the U.S. Department of Justice’s Fee Waiver Policy Guidance.

¹⁸ 484 F.2d 820 (D.C. Cir. 1973).

¹⁹ 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1).

²⁰ The U.S. Department of Justice (DOJ) has identified six factors to assess whether the two requirements have been met, and the courts have applied these factors. *See, e.g.*, Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), *available at* http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *see also* *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004).

²¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(c)(1)(iii).

²² 5 U.S.C. § 552(a)(4)(A)(iii).

²³ *See* 40 C.F.R. § 2.107(l)(2).

1. The request concerns the operations or activities of the government.

The requested records concern “the operations or activities of the government.”²⁴ EPA is responsible for developing appropriate regulations to implement the Clean Water Act. EPA must also ensure that its choice of action is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. Records regarding EPA’s development of the Final 316(b) Rule and its consultation with other agencies on the potential and probable impacts of the rule on aquatic resources including threatened and endangered species and their critical habitat plainly concern the operations or activities of government.

2. The disclosure is likely to contribute to an understanding of government operations and activities.

The requested records are “likely to contribute” to public understanding of the activities described above.²⁵ These materials will contribute meaningfully to public understanding of government activities, specifically EPA’s development of the Final 313(b) rule and its consultation on potential jeopardy to endangered and threatened species resulting from regulating cooling water intake structures. Since the rule has now been signed by the Administrator, the requested records will shed light on a more complete assessment of the development of that rule and measures to protect threatened and endangered species and their critical habitat.

3. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

Disclosure of these records will also “contribute to the understanding of a reasonably broad audience of persons interested in the subject.”²⁶ The Natural Resources Defense Council (NRDC) and Riverkeeper have a proven ability to digest and disseminate such information to the public quickly, through numerous and varied publications, educational programs, media initiatives, and public interest litigation. NRDC has already generated significant press coverage regarding the implementation and enforcement of the nation’s clean water laws. *See, e.g.*, Alison Kosik, “Experts: U.S. water infrastructure in trouble,” *CNN, International* (Jan. 21, 2011), *available at* <http://www.cnn.com/2011/US/01/20/water.main.infrastructure/index.html>; Gitte Laasby, “Is GSD turning lake into sewer?,” *Post-Tribune* (Jan. 31, 2011), *available at* <http://posttrib.suntimes.com/news/lake/3580708-418/overflows-gary-sewage-treatment->

²⁴ 40 C.F.R. § 2.107(l)(2)(i).

²⁵ 40 C.F.R. § 2.107(l)(2)(ii).

²⁶ 40 C.F.R. § 2.107(l)(2)(iii).

plant.html; Bettina Boxall, "In a region that imports water, much goes to waste," *Los Angeles Times* (Dec. 24, 2010), available at <http://www.latimes.com/news/local/la-me-water-storms-20101224.0,592116.story>; "Climate Change Worsens U.S. Beachwater Pollution," *Environmental News Service* (July 29, 2009), available at <http://www.ens-newswire.com/ens/jul2009/2009-07-29-02.html>. Similarly, NRDC will disseminate summary and analysis of any newsworthy information conveyed in the requested records.

NRDC has the ability to disseminate information on water quality issues through its website (<http://www.nrdc.org>), which is updated daily and draws approximately 1,280,000 page views and 590,000 unique visitors per month; issues of *OnEarth* magazine, which is distributed to approximately 33,700 email subscribers and made available online free of charge at <http://www.nrdc.org/onearth>; its *Nature's Voice* newsletter on current environmental issues, distributed four times a year to NRDC's more than one million members and online activists and available online at <http://www.nrdc.org/naturesvoice/default.asp>, and other newsletters and alerts, including the following. NRDC's *Activist Network* email list has more than 540,000 members who receive biweekly information on urgent environmental issues. Information disseminated to *Activist Network* email subscribers is also available online at NRDC's Action Center, <http://www.nrdc.org/action/default.asp>. *This Green Life* is NRDC's electronic newsletter on environmentally sustainable living. It is distributed by email to 57,500 subscribers and made available online at <http://www.nrdc.org/thisgreenlife/default.asp>. *NRDC Online* is a semimonthly electronic environmental newsletter distributed by e-mail to more than 81,300 subscribers, at <http://www.nrdc.org/newsletter>. NRDC also maintains a staff blogging site, "Switchboard," at <http://switchboard.nrdc.org>, which is updated daily and features more than 250 bloggers writing about current environmental issues. The blogs draw approximately 150,000 page views and 125,000 unique visitors per month; Switchboard's RSS feeds have approximately 11,150 subscribers; and Switchboard posts appear on websites of other major internet media outlets, such as "The Huffington Post," at <http://www.huffingtonpost.com>. NRDC's profiles on "Facebook," at <http://www.facebook.com/nrdc.org>, and "Twitter," at <http://www.twitter.com/nrdc>, are updated daily and have approximately 258,000 fans and 136,000 followers, respectively.

NRDC issues press releases; participates in press conferences and interviews with reporters and editorial writers; and has nearly thirty staff members dedicated to communications work, see "Communications" staff list at <http://www.nrdc.org/about/staff.asp>. NRDC employees provide Congressional testimony; appear on television, radio and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. See, e.g., Testimony of David Doniger, NRDC Climate Center Policy Director, before United States House Subcommittee on Energy and Environment, Apr. 24, 2009; Transcript, "Pollution Still a Hazard to U.S. Beaches," CBS, *CBS NEWS*, July 29, 2009 (featuring NRDC Water Program Co-Director Nancy Stoner); Transcript, "Companies Quit U.S. Chamber Over Climate Policy," National Public Radio, Oct. 6,

2009 (featuring NRDC Climate Campaign Director Pete Altman; Conference brochure, “World Business Summit on Climate Change,” May 24-26, 2009 (featuring NRDC Director for Market Innovation Rick Duke at 9); Article, “For climate pact, a step back is sold as first step,” *Chicago Tribune*, Nov. 22, 2009 (featuring NRDC International Climate Policy Director Jake Schmidt); Article, “Court Showdown Looms for NYC Electronics Recycling Law,” *New York Times*, Jan. 5, 2010 (featuring NRDC Attorney Kate Sinding); Article, “Environmental groups try to block parts of California’s green building code,” *Los Angeles Times*, Jan. 11, 2010); Article, “An Inconceivable Truth,” *Vogue*, Aug. 2007 (featuring NRDC Public Health Scientist Sarah Janssen); Article, “Green State of the Union,” *Deliver Magazine*, Sept. 2009 (written by NRDC communications staff member Francesca Koe); Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall); Research article, “Outcomes of the California Ban on Pharmaceutical Lindane: Clinical and Ecological Impacts,” *Environmental Health Perspectives*, March 2008 (co-authored by NRDC Public Health Scientist Sarah Janssen and NRDC Public Health Senior Scientist Gina Solomon); Publisher’s notes to *Clean Energy Common Sense: An American Call to Action on Global Climate Change* (Rowman & Littlefield Publishers, Inc. 2009), by NRDC President Frances Beinecke; and NRDC: Publications in Print, <http://www.nrdc.org/publications>.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below.

- a. In October 2008, NRDC issued a report assessing the degree of enforcement of California’s environmental and public health laws. This report, *An Uneven Shield: The Record of Enforcement and Violations Under California’s Environmental, Health, and Workplace Safety Laws*, examined data on known violations and law enforcement responses under six critical pollution, health, and workplace safety programs. Much of the data analyzed in the study was obtained through formal FOIA requests. *See id.* at pp. 4, 16.
- b. NRDC obtained, through a court-enforced FOIA request, records of the operations of the Bush administration’s Energy Task Force, headed by Vice President Dick Cheney. It made those records available, along with analysis of selected excerpts and links to the administration’s index of withheld documents, on NRDC’s website at <http://www.nrdc.org/air/energy/taskforce/tfinx.asp>. NRDC’s efforts helped to inform the public about an issue that, even before the records’

release, had attracted considerable attention. *See, e.g.*, Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22; Bennett Roth, "Houston Energy-Drilling Firm Appears in Documents from Energy Department," *Houston Chronicle*, Apr. 12, 2002.

- c. NRDC obtained, through a FOIA request, a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. NRDC used this memorandum to help inform the public about what may have been behind the decision by the Bush administration to replace Dr. Watson. *See* NRDC Press Release and accompanying Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002; Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19.
- d. NRDC incorporated information obtained through FOIA into a 2005 report, published and provided free of charge at NRDC's website, *see* <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report). Since the report's publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, "Protest Raised over New Tests of Naval Sonar," National Public Radio, *All Things Considered*, July 24, 2007.
- e. NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004.
- f. NRDC has used White House documents obtained through FOIA to inform the public about EPA's failures to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See* <http://www.nrdc.org/health/pesticides/natraine.asp>; *see also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?," *Harper's Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC).

- g. NRDC has obtained, through FOIA, information on the levels of arsenic in drinking water supplies across the country. NRDC incorporated much of the information into a report, *Arsenic and Old Laws* (2000), printed and made available online through NRDC's website, *see* <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp>, and provided analysis describing its significance and guiding interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; *see also* Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report).
- h. In 2000, NRDC used information obtained through FOIA to publish a report analyzing the impacts of manure pollution from large livestock feedlots on human health, fish and wildlife. *See* NRDC, *Spills & Kills*, Aug. 2000.
- i. In 1999, NRDC obtained, through FOIA, a Defense Department document, *History of the Custody and Deployment of Nuclear Weapons: July 1945 through September 1977*. The document attracted significant press attention once it was disclosed. *See, e.g.*, Walter Pincus, "Study Says U.S. Secretly Placed Bombs; Cold War Deployments Affected Mostly Allies," *Washington Post* (Oct. 20, 1999) at A3. One of NRDC's nuclear scientists, Robert Norris, published a detailed analysis of this document explaining its significance to the public. *See* Robert S. Norris, William M. Arkin, and William Burr, "Where They Were," *Bulletin of Atomic Scientists*, Nov./Dec. 1999.
- j. In 1996, NRDC obtained, through FOIA, test results regarding lead levels in the District of Columbia's drinking water supplies. NRDC made the test results public along with analysis explaining the significance of the results. *See* D'Vera Cohn, "Tap Water Safeguards Still Stalled; City Failed to Tell Some Residents of Excess Lead Contamination," *Washington Post*, Apr. 18, 1996, at J1.
- k. In 1989, NRDC obtained, through FOIA, testimony, previously suppressed by the first Bush administration, by federal experts who opposed oil drilling off the coasts of California and Florida. *See* Larry Liebert, "Oil Testimony Reportedly Quashed; Environmentalists say Federal Experts Pressured by Bush," *Orange County Register*, Oct. 5, 1989, at A6.
- l. In 1988, NRDC obtained, through FOIA, a report by the U.S. Fish and

Wildlife Service that declared that the government's review of offshore oil drilling in Northern California was incomplete and overly optimistic. Reagan administration officials had tried to keep the report secret and then repudiated it upon its release. *See* Eric Lichtblau, "Federal Report Blasts Offshore Oil Studies," *L.A. Times*, June 4, 1988, at A32.

- m. In 1982, NRDC obtained, through a FOIA request, an EPA memorandum stating that most air pollution monitors have repeatedly underestimated levels of toxic lead in the air. NRDC used the memorandum to inform the public about the consequences of EPA's proposal to relax restrictions on lead in gasoline. *See* Sandra Sugawara, "Lead in Air is Undermeasured, EPA Section Chief's Memo Says," *Washington Post*, July 11, 1982, at A6.

Likewise, Riverkeeper also has a proven ability to digest and disseminate such information to the public quickly, through numerous and varied publications, educational programs, media initiatives, and public interest litigation. Riverkeeper has already generated significant press coverage regarding cooling water intake structures. Riverkeeper disseminates information on water quality issues through its website (<http://www.Riverkeeper.org>), which is updated daily and draws approximately 80,000 page views and 20,000 visits per month; Riverkeeper also has a substantial Member Alert program which includes monthly e-newsletters, action alerts and event announcements and updates. Riverkeeper's e-alert email list has more than 17,000 subscribers who receive information on urgent environmental issues. *The Riverkeeper Journal* is Riverkeeper's annual journal, receiving over 5,000 original impressions (hard copy) and is made available in both hard copy and online at <http://www.riverkeeper.org/about-us/publications/the-journal/>. Riverkeeper also maintains a staff blog which features additional bloggers writing about power plant intake structures with a particular emphasis on EPA's national regulation. Additionally, Riverkeeper's various online profiles on "Twitter," "Facebook," "Youtube," and "Flickr," allow members and interested groups to stay current on Riverkeeper events, videos and news. Riverkeeper also routinely uses FOIA to obtain information from federal agencies that Riverkeeper's legal and scientific experts and partners analyze in order to inform the public about a variety of issues relation to keeping the nation's waters fishable, drinkable, and swimmable. Riverkeeper specifically makes information about cooling water intake structures available on its website at www.riverkeeper.org.

As these examples demonstrate, Requesters have a proven ability to digest and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute significantly to the understanding of a reasonably broad audience of persons interested in the subject.

4. The information will contribute "significantly" to public

understanding of government operations or activities.

Disclosure of the requested documents is “likely to contribute significantly to public understanding,”²⁷ because Requesters intend to disseminate any newsworthy information in the released records, and their analysis of such records, to their member bases and to the broader public, through one or more of the many communications channels referenced above. As NRDC’s and Riverkeeper’s long history of incorporating information obtained through FOIA into reports, articles and other communications illustrates, Requesters are well prepared to convey to the public any relevant information it obtains through this records request.²⁸

None of the materials requested are now widely known (if they have been made public at all), yet they are essential to evaluating EPA’s Section 316(b) rulemaking, the benefits of that rulemaking, the implementation of the final regulations, how endangered and threatened species will be impacted, and the benefits of installing the best technology available for minimizing the adverse environmental impacts of cooling water intake structures at existing facilities. As discussed above, these materials will allow the public and independent experts to critically evaluate the benefits of intake structure regulations and the Requesters to disseminate an informed understanding of the government’s decision-making process and potential impacts of the implementation of the regulations.

Therefore, the public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, will be enhanced by the disclosure to a significant extent.²⁹

B. Requesters have no commercial interest in this information.

Disclosure in this case would also satisfy the second prerequisite for a fee waiver because Requesters do not have any commercial interest that would be furthered by the requested disclosure.³⁰ NRDC and Riverkeeper are not-for-profit organizations and, as such, have no commercial interest.³¹ “Congress amended FOIA to ensure that it be

²⁷ 5 U.S.C. § 552(a)(4)(iii); 40 C.F.R. § 2.107(l)(2)(iv).

²⁸ For example, information NRDC obtained through FOIA requests resulted in the following articles, in addition to those referenced above: Felicity Barringer, “Science Panel Issues Report on Exposure to Pollutant,” *New York Times* (Jan. 11, 2005); Katharine Q. Seelye, “Draft of Air Rule is Said to Exempt Many Old Plants,” *New York Times* (Aug. 22, 2003); Don Van Natta, Jr., “E-Mail Suggests Energy Official Encouraged Lobbyist on Policy,” *New York Times* (Apr. 27, 2002).

²⁹ 40 C.F.R. § 2.107(l)(2)(iv).

³⁰ 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

³¹ 40 C.F.R. § 2.107(l)(3)(i).

‘liberally construed in favor of waivers for noncommercial requesters.’”³² Requesters’ interest in obtaining the requested materials is to serve the public interest by disclosing presently non-public information about EPA’s implementation of Section 316(b) of the CWA.

For all of the foregoing reasons, a fee waiver is warranted here. As noted above, the attachments show that in 2013 EPA twice granted us fee waivers in substantially identical circumstances.

C. Requesters are media requesters

Even if EPA were to deny a public interest waiver of all costs and fees, Requesters are representatives of the news media entitled to a reduction of fees under FOIA and EPA’s FOIA regulations.³³ Under FOIA, a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”³⁴

As described earlier in this request, NRDC publishes OnEarth, a monthly online magazine, which is distributed to approximately 33,700 email subscribers and made available online free of charge at <http://nrdc.org/onearth>; publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. These publications routinely include information about current events of interest to the readership and the public. NRDC staff members are also regular contributors to numerous periodicals and books; television, radio, and web programs; and hearings and conferences. Finally, as described above, NRDC maintains a significant additional communications presence on the internet through staff blogs and secondary coverage of NRDC communications on websites not affiliated with NRDC.³⁵ NRDC has previously been categorized as a “news media” requester under FOIA.³⁶

³² *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted); *see also Forest Guardians v. U.S. Dep’t of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

³³ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(c)(1)(iii), (I).

³⁴ 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. United States Dep’t of Def.*, 241 F. Supp. 2d 5, 11-14 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

³⁵ *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”).

³⁶ Letter from Alexander C. Morris, FOIA Officer, United States Dep’t of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (granting NRDC media requester status, and also granting a full fee waiver). A copy of that letter is attached hereto.

As also described above, Riverkeeper publishes an annual magazine, *The Riverkeeper Journal*, which has approximately 17,000 subscribers; publishes a regular newsletter for its more than 4,500 members and more than 15,000 online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. These publications routinely include information about current events of interest to the readership and the public. Riverkeeper staff members are also regular contributors to numerous periodicals and books; television, radio, and web programs; and hearings and conferences. Finally, as described above, Riverkeeper maintains a significant additional communications presence on the internet through staff blogs and secondary coverage of Riverkeeper communications on websites not affiliated with Riverkeeper. Thus, Riverkeeper is also a media requester.

As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of Requesters' publications or other suitable media channels.

IV.

WILLINGNESS TO PAY FEES UNDER PROTEST

Please provide the records above irrespective of the status and outcome of your evaluation of Requesters' fee category assertion and fee waiver request. In order to prevent delay in EPA's provision of the requested records, Requesters state that they will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations.³⁷ Please consult with us, however, before undertaking any action that would cause the fee to exceed \$150. Such payment will not constitute any waiver of Requesters' right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

Thank you for your attention to this matter. If there is anything we can do to facilitate this request or if you have any questions, please contact us.

Very truly yours,



Reed W. Super

Attachments

³⁷ 40 C.F.R. § 2.107(c)(1)(iv), (c)(2), and (d).

Larry Gottesman
August 14, 2014
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cc (via e-mail):

Robert Wood, EPA
Julie Hewitt, EPA
Richard Witt, EPA OGC